Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02107/2017

THE IMMIGRATION ACTS

Heard at Field House
On 9th November 2018

Decision and Reasons Promulgated
On 16th November 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MICHAEL [O]
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr Z Jafferji, instructed by Oasis solicitors

DETERMINATION AND REASONS

1. The SSHD sought and was granted permission to appeal a decision of the First-tier Tribunal which allowed Mr [O]'s appeal against a decision of the SSHD revoking his Permanent Residence Card dated 10th February 2017.

Background

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2. Mr [O] entered Germany in 1997 and met his now deceased ex-wife there. In 2000 they moved to the UK and they were married in a Registry Office in Southwark in December 2000. He was issued with a residence card in February 2002 and then in 2006 was issued with a permanent residence card. The SSHD accepted that Ms [NN], his ex-wife, a German citizen, was exercising Treaty rights in the UK during that period.

3. In April 2015 Mr [O] applied to naturalise; that application was refused. He applied again in September 2015 and the application was again refused and it was at that time he became aware that the nature of his marriage was under consideration. He was then served with the decision revoking his Permanent Residence card, the decision which is the subject of this appeal.

4. The First-tier Tribunal judge found Mr [O] “credible in respect of all aspects of his appeal” and accepted Mr [O]’s evidence regarding his relationship with his wife as credible, namely:

   (i) His wife became very angry with him when she discovered that he had fathered two children with their landlady, born 2004 and 2005 (one of those children has since died but he maintains contact with the other).

   (ii) He had told her of the birth of the children in 2005.

   (iii) She subsequently forgave him, and their marriage continued.

   (iv) Their marriage broke down in 2008 and was dissolved in 2009 but they remained good friends.

   (v) They subsequently reconciled after about two years and lived together again in the UK between about 2011 and 2013.

   (vi) His ex-wife returned to live in Germany in 2013 and the couple remained good friends and in touch with each other.

   (vii) That had it not been for her death on 2nd April 2018, she would have attended the hearing of his appeal before the First-tier Tribunal to give evidence in accordance with her witness statement.

5. Ms [NN] signed a witness statement on 3rd March 2018 in which she fully supported the account given by Mr [O], confirmed that their relationship was genuine and that she fully supported his application for a Residence Card and then for a Permanent Residence Card. She confirmed his account of the extra marital affair, that she accepted his apology, that they were reconciled but then the marriage broke down and she moved back to Germany.

6. The First-tier Tribunal judge found that Mr [O] was not in a relationship with the mother of the two children at the time of his marriage to Ms [NN] or when he was granted his residence card or when he was granted his permanent residence card. There was no challenge by the respondent to the evidence that the couple had lived together in Germany prior to coming to the UK in 2000 or that they were living together in the UK between 2000 and 2002 when they were married.

<u>First-tier Tribunal decision</u>

7. The First-tier Tribunal found:

> (9) [Mr [O]] brings this appeal and therefore bears the burden of proof. [Mr [O]] must satisfy the burden on a balance of probabilities.
>
> …
>
> (21) … I accept the submissions of [Mr [O]'s] representative that the matters raised by the [SSHD] in respect of [Mr [O]] becoming a father with another woman is not relevant when assessing whether the marriage entered into is one of convenience that conclusion just does not fit in with the factual matrix of this appeal.

Error of Law

8. The SSHD sought and was granted permission to appeal on the grounds firstly that the First-tier Tribunal judge had applied the incorrect burden of proof (*Sadovska* [2017 UKSC 54) and secondly that the judge failed to take into account the fact of him having two children outside marriage (*Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038.

9. On the face of the decision the First-tier Tribunal judge has not approached the burden of proof correctly. There is no burden upon an appellant to demonstrate that his marriage is *not* one of convenience; the evidential burden lies upon an appellant to address evidence that justifies a reasonable suspicion that the marriage was entered into for the predominant purpose of securing residence rights. In this case, as submitted by Mr Jafferji, the First-tier Tribunal judge has approached the issue as one of Mr [O] proving that his marriage was not one of convenience. The judge has, he submitted applied a higher burden and standard upon Mr [O] than was called for and this, if anything, reinforces the First-tier Tribunal judge's decision to allow the appeal.

10. The recitation by the First-tier Tribunal that the existence of the two children was not relevant was, submitted Mr Jafferji, because when read in the context of the decision, it was correct. The judge accepted that Mr [O] and his ex-wife were credible witnesses and that the factual account (unchallenged by the SSHD by me) was true – he did not know the mother of the two children prior to his marriage and they were not (and are not) in a relationship when he and Ms [NN] married, they had lived together in Germany and in the UK prior to their marriage and had remained good friends (and rekindled their relationship for a couple of years) after their divorce. Mr Jafferji submitted that there was no evidence sufficient to justify a reasonable suspicion that Mr [O] had entered into a marriage of convenience. He submitted that there was no evidence Mr [O] had deceived his wife; no evidence that both parties were a party to a marriage of convenience; no evidence that the parties to the marriage were even complicit in arranging a marriage to enable Mr [O] to remain in the UK; that the SSHD, despite raising a question about the marriage in December 2015 had undertaken no investigation at all for example by contacting the ex-wife or by contacting the mother of the two children; that had the SSHD seriously wished to discharge the burden on him then there would have been at least some investigation.

11. I accept Mr Jafferji's submission that the burden of proof as set out in the decision by the First-tier Tribunal ([9]) has placed a higher and incorrect burden upon Mr [O]. This has meant that the findings made by the judge have been made with that in mind – he has found Mr [O]'s account of his relationship credible and sustainable in the context, in effect although erroneously, of having accepted that the SSHD has raised a reasonable suspicion. The last sentence in [21] is not straightforward when read out of context. But when read in the context of the evidence as a whole it is plain that the relationship is of no relevance to whether the marriage was one of convenience – Mr [O] did not know the mother of the two children prior to his marriage to Ms [NN]; there was no suggestion that he had known her when he obtained his first residence permit, there was no suggestion that he intended to live with the mother of the two children and he and his wife continued to live together as husband and wife after the birth of the children, during the currency of the application for permanent residence and thereafter. There was no reasonable suspicion by the SSHD sufficient to shift the burden to Mr [O].

12. Although the First-tier Tribunal applied the incorrect burden of proof and could have explained his decision that the birth of the two children was not relevant to the decision he had to make with more clarity, those errors are not material to the outcome of the appeal.

13. There is no material error of law by the First-tier Tribunal such that the decision is set aside to be remade.

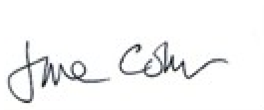
Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The decision of the First-tier Tribunal stands.

Date 12th November 2018



Upper Tribunal Judge Coker